STATE OF MICHIGAN

COURT OF APPEALS

CAPITAL ONE BANK, N.A.,

Plaintiff-Appellee,

v

M.H. MANAGEMENT, INC.,

Defendant-Appellant,

MATTHEW LENART,

Defendant.

UNPUBLISHED
January 28, 2014

No. 310651
Bay Circuit Court
LC No. 10-3157 CK KS

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant M.H. Management, Inc. ("M.H.") appeals by leave granted the order partially granting plaintiff Capital One Bank, N.A.'s second motion for summary disposition. The trial court granted plaintiff's second motion for summary disposition in regards to M.H., after finding that defendant Matthew Lenart acted with at least apparent authority when he opened a credit account with plaintiff and used it to make purchases. For the reasons set forth in this opinion, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

On or around February 21, 2006, defendant Lenart, apparently using his personal social security number, opened a credit card account with plaintiff. According to the deposition testimony of deposition of Judith Sheehan, M.H.'s current accounts payable clerk, Lenart was the "general manager" for M.H., a corporation that managed four or five mobile home parks in or around Bay City, Michigan. All billing statements were mailed directly from plaintiff to M.H.'s address. At the time the charges were made, defendant Lenart had authorization to pay bills and had authority to do so by using signature stamps of Rodney Sabourin and Lane S.

Sabourin, a married couple who were the actual owners and officers of M.H.[1]. The payments that were made were paid to plaintiff from accounts belonging to assorted companies under the direct control of M.H. Furthermore, the credit card account was used to make purchases at restaurants, retail stores, and some business related entities, and at least one purchase involved an airline ticket for Rodney Sabourin. On or around December 2008, M.H. fired Lenart, allegedly for financial irregularities, including embezzlement. On January 7, 2009, a final payment was made to plaintiff from an account controlled by M.H. for the amount of $610.00.

At issue in the instant appeal is the trial court's partial grant of summary disposition in favor of plaintiff on the ground that Lenart acted as M.H.'s agent. M.H. challenges this conclusion.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo and is viewed in a light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Id*.

The statute of frauds requires that every agreement to answer for the debt of another be in writing and signed by the party to be charged. MCL 566.132(1)(b); see also *Schier, Deneweth & Parfitt PC v Bennett*, 206 Mich App 281, 283; 520 NW2d 705 (1994). The documents that plaintiff provided on appeal indicate that Matthew Lenart opened the account. There is no representation that Lenart acted on behalf of defendant M.H. Management, or that his actions were authorized by M.H. Management. Plaintiff did not attach the actual documents used by Lenart to open the account, and nothing presented contains an indication or the actual agreement as to how the account was also established in M. H. Management's name. The bills are all addressed to Matthew S. Lenart at M. H. Management, and were sent to the office address. Moreover, according to the affidavit from plaintiff's litigation support representative and agent, Ottis Coward, the only credit card issued was to Matthew S. Lenart. In short, nothing indicates that the account was opened in M. H. Management's name, or with its knowledge or approval, based on some act other than Lenart's. We also note that plaintiff does not contest the fact that M.H. did not sign an agreement. Rather, it is the contention of plaintiff that Lenart was acting as an agent of M.H., who had both actual and apparent authority to bind the principal, M.H. We therefore examine whether summary disposition was warranted in this action on the theory that Lenart was an agent of M.H. and could thereby bind M.H. to the debt at issue.

[1] Although the record is not clear as to the exact relative ownership relationship of Lane and Rodney Sabourin, this is not necessary for resolution of the instant appeal.

"Under fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority." *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001), citing *Shinabarger v Phillips*, 370 Mich 135, 141; 121 NW2d 693 (1963). Actual authority may be either implied or express. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). "Implied authority is the authority an agent believes the agent possesses." *Id.* at 528, citing *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). "[T]he authority of an agent includes not only those things he is expressly told to do, but those things the principal knowingly acquiesces in his doing." *Field v Jack and Jill Ranch*, 343 Mich 273, 279; 72 NW2d 26 (1955). "After the agency relationship and the extent of the agent's authority have been shown, the principal has the burden of proving that the agent's authority was limited." *Meretta*, 195 Mich App at 698, citing 3 Am Jur 2d, Agency, § 359, p 870. "Actual authority…may be implied from the circumstances surrounding the transaction at issue[,]" but the "circumstances must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal." *Chiamp v Hertz Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). "[W]here there is a disputed question of agency, any evidence, either direct or inferential, which tends to establish an agency relationship creates a question of fact for the jury to determine." *Vargo v Sauer*, 457 Mich 49, 71; 576 NW2d 656 (1998).

Apparent authority may arise when acts and appearances lead a third person to believe that an agency relationship exists. *Meretta*, 195 Mich App at 698-699. Apparent authority must be traced to the principal, and cannot be established by the acts of the agent. *Id*. In determining whether an agent possesses apparent authority, the court must look at all surrounding facts and circumstances and determine whether an ordinarily prudent person would be justified in assuming that the agent had authority to take action. *Id*.

> Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform on behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it. [*Id*., at 699-670, quoting *Central Wholesale Co v Sefa*, 351 Mich 17, 26-27; 87 NW2d 94 (1957), citing *Faber v Eastman, Dillon & Co*, 271 Mich 142, 145; 259 NW 880 (1935).]

Here, the trial court found that there was no question of fact concerning apparent agency. We disagree. In reaching this conclusion, the trial court relied on the deposition testimony of Judith Sheehan. Sheehan stated that Lenart was "effectively in charge of everything." In addition, Sheehan also stated that Lenart was M.H.'s general manager, and had authority over M.H.'s bank account. However, Sheehan admitted that she was not employed at the same time by M.H. as Lenart, and had no personal knowledge regarding whether M. H. Management had authorized Lenart to make charges on the credit card. Additionally, in her deposition, Sheehan admitted that she had no knowledge of the charges made on the credit card, or who had made them, or whether the purchases benefitted M.H. She also had no knowledge of the circumstances surrounding the signing of the card agreement. She further averred that, M.H.'s controller, Michael Meyers, as well as Mr. Sabourin, had relayed to her that M.H. had no knowledge that Lenart had opened the account, and that Lenart's action was done without M.H.'s authorization.

The affidavit of Lane Sabourin also creates a genuine issue of material fact as to whether Lenart had actual or apparent authority to bind M.H. In her affidavit, Sabourin stated that Lenart was never an officer, director, or owner of M.H., that he was never given any written or oral permission to open credit card accounts with plaintiff, and that he had no authority to do so. She also stated that "no person connected with M.H. Management Inc. did anything that would have made it appear that Matthew Lenart had the authority to open a credit account with the Plaintiff, nor were there any circumstances that would have made it appear that Matthew Lenart had the authority to open a credit account with the Plaintiff." She further maintained that Lenart acted "without the knowledge of any other person connected with M.H. Management, Inc."

"It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *SSC Assocs Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Examining Sabourin's affidavit testimony in the light most favorable to defendant, there is a question of fact as to whether Lenart was an actual or apparent agent of appellant. Sabourin maintains that Lenart did not have actual authority to act for M.H. and she was in the best position to know the scope of Lenart's authority. Her denial at the very least raised a question of fact concerning Lenart's actual authority.

We also answer the remaining question of whether there was a genuine issue of material fact concerning Lenart's apparent authority to obtain the credit card in the affirmative. Plaintiff presented no evidence concerning how it came to open the account. The documents that plaintiff has provided on appeal only indicate that Matthew Lenart opened the account, and there is no evidence that he represented that he acted on behalf of defendant, or that his action was authorized by defendant. Plaintiff did not attach the documents used by Lenart to open the account, or the actual agreement showing how the account was established in M. H. Management's name. The bills are all addressed to Matthew S. Lenart at M. H. Management, and sent to the office address. Nothing indicates that the account was opened in M. H. Management's name based on some act other than Lenart's. Thus, there is at least a question of fact as to whether Lenart was an apparent agent of M. H. Management. Accordingly, we find that the trial court erred in granting partial summary disposition to plaintiff.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded to either party. MCR 7.219.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher